

ST 00-0063-GIL 03/20/2000 SERVICE OCCUPATION TAX

Under the Service Occupation Tax Act, an exemption exists for the sale, employment and transfer of such tangible personal property as newsprint and ink for physical incorporation into newspapers or magazines. See 86 Ill. Adm. Code 140.125. (This is a GIL).

March 20, 2000

Dear Xxxxx:

This letter is in response to your email dated February 12, 2000 and attached memorandum. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

We have been struggling with the definition of our client's sales tax responsibilities in your state. Please look over the attachment to this e-mail and, after reading it over, call me to discuss. Your patience and assistance will be welcomed.

Let me know if you can't open the attached memo. I will send it another way, if necessary.

An Illinois retailer is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois retailer is liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by purchasers.

The definition of a "retailer maintaining a place of business in Illinois" is set forth at 86 Ill. Adm. Code 150.201(i), see enclosed. An out-of-State retailer maintaining a place of business in this State is required to register with the State as an Illinois Use Tax collector. See the enclosed copy of 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of its Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The final type of retailer is simply the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax law. A retailer in this situation does not incur Retailer' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's sales tax laws. The Supreme Court has set out a two-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due Process will be satisfied if the person or entity purposely avails himself or itself of the benefits of an economic market in a forum state. *Id.* at 1910. The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause.

A physical presence does not mean simply an office or other physical building. Under Illinois tax law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative and it is immaterial for tax purposes that the representative's presence is temporary.

Under the Service Occupation Tax Act, servicemen are taxed on tangible personal property transferred as an incident to sales of service. See the enclosed copy of 86 Ill. Adm. Code 140.101. The purchase of tangible personal property that is transferred to the service customer may result in either Service Occupation Tax liability or Use Tax liability for the servicemen depending upon which tax base the servicemen choose to calculate their tax liability. The servicemen may calculate their tax base in one of four ways: (1) separately stated selling price of tangible personal property transferred incident to service; (2) 50% of the servicemen's entire bill; (3) Service Occupation Tax on the servicemen's cost price if the servicemen are registered de minimis servicemen; or (4) Use Tax on the servicemen's cost price if the servicemen are de minimis and are not otherwise required to be registered under the Retailers' Occupation Tax Act.

Using the first method, servicemen may separately state the selling price of each item transferred as a result of the sale of service. The tax is based on the separately stated selling price of the tangible personal property transferred. If the servicemen do not wish to separately state the selling price of the tangible personal property transferred, the servicemen must use 50% of the entire bill to the service customer as the tax base. Both of the above methods provide that in no event may the tax base be less than the servicemen's cost price of the tangible personal property transferred.

The third way servicemen may account for tax liability only applies to de minimis servicemen who have either chosen to be registered or are required to be registered because they incur Retailers' Occupation Tax liability with respect to a portion of their business. Serviceman may qualify as de minimis if the servicemen determine that the annual aggregate cost price of tangible personal property transferred as an incident of the sale of service is less than 35% of the servicemen's annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). This class of registered de minimis servicemen is authorized to pay Service Occupation Tax (which includes local taxes) based upon the cost price of tangible personal property transferred incident to the sale of service. They remit the tax to the Department by filing returns and do not pay tax to suppliers. They provide suppliers with Certificates of Resale for the property transferred to service customers.

The final method of determining tax liability may be used by de minimis servicemen that are not otherwise required to be registered under the Retailers' Occupation Tax Act. Servicemen may qualify as de minimis if the servicemen determine that the annual aggregate cost price of tangible personal property transferred as an incident of the sale of service is less than 35% of the servicemen's annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). Such de minimis servicemen may pay Use Tax to their suppliers or may self assess and remit Use Tax to the Department when making purchases from unregistered out-of-State suppliers. The servicemen are not authorized to collect "tax" from their service customer nor are the servicemen liable for Service Occupation Tax. It should be noted that servicemen no longer have the option of determining whether they are de minimis using a transaction by transaction basis. Both Illinois servicemen and out-of-State servicemen may qualify as de minimis serviceman if they meet the above requirements.

Under the Service Occupation Tax Act, an exemption exists for the sale, employment and transfer of such tangible personal property as newsprint and ink for physical incorporation into newspapers or magazines. See 86 Ill. Adm. Code 140.125(i), enclosed. In addition, Section 2 of both the Use Tax Act and the Service Use Tax Act provide that the purchase, employment and transfer of such tangible personal property as newsprint and ink for the primary purpose of conveying news (with or without other information) is not a purchase, use or sale of tangible personal property. 35 ILCS 105/2 and 35 ILCS 110/2 (1998 State Bar Edition).

The exemption for newspapers and magazines stems from the exemption afforded newsprint and ink under the sales tax Acts. See 86 Ill. Adm. Code 130.2105, enclosed. The requirements for a publication to constitute a "magazine" have been clarified by case law. In *Moody's Investors Service, Inc. v. Department of Revenue*, 112 Ill.App.3d 1024, 68 Ill.Dec. 478, 445 N.E.2d 1331 (1983), the appellate court stated that one test must be met and several other factors are taken into consideration in determining whether a publication constitutes a "magazine." The publication must be published more than once a year. Quarterly, weekly, monthly or even semi-annual publications meet this test. Other factors which are taken into consideration are whether the magazine contains articles and items which are of value to the public, rather than to a specialized group of people; if it has the basic format of a magazine (such as a soft cover, individual pages, indexed articles); whether it can be subscribed to; whether it contains general advertising; and if it is commonly accepted as a magazine. The Supreme Court of Illinois affirmed the appellate court's decision in *Moody's Investors Service, Inc. v. Department of Revenue*, 101 Ill.2d 291, 78 Ill.Dec. 138, 461 N.E.2d 972 (1984).

An exemption certificate is not necessary in order to claim the newsprint and ink exemption. However, documentation recording such sales of newsprint and ink is recommended as part of the retailer's or serviceman's books and records.

With regard to credit for taxes imposed by the State of Wisconsin and paid to such state, please contact the Wisconsin Department of Revenue.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

ST 00-0063-GIL

Page 4

March 20, 2000

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Gina Roccaforte
Associate Counsel

GR:msk
Enc.